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VIA E-MAIL COMMENTLETTERS@WATERBOARDS.CA.GOV

State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Attn: Song Her, Clerk to the Board

Re: June 19, 2007 Water Right Enforcement Workshop

Dear Board Members:

As an attorney who has practiced and specialized in the field of water rights for over 30 years, I appreciate the opportunity to provide comments on the subject of potential water right enforcement. Over the decades that I have represented water right applicants and permit and license holders, I have witnessed far-reaching changes in the policies, procedures and attitudes of the Board and its staff in administering the water right system. Although well-intentioned, these changes have resulted in a water right process that is now all but paralyzed. The water right process is now characterized by years-long long delays, uncontrolled and uncontrollable costs, blanket protests that cannot be addressed on an individual basis, and a shifting and seemingly never-ending metamorphosis of CEQA requirements.

In this current context, consideration of an enforcement policy has a blame-the-victim quality. This attitude is made plain by the statement in the Notice of Public Workshop ("Notice") that "Due to the time and costs associated with securing or amending a water right permit, **an economic incentive to violate water right laws exists."** (Emphasis added.) Although such an "incentive" may exist in the abstract, I know of no water right applicant or permit or license holder whose motive is to reap economic benefit from the currently dysfunctional administrative process – to the contrary, they have spent considerable amounts of money and time in an effort to comply with the Board's requirements and obtain the proper authorization for their activities.

I urge the Board to look deeper than "enforcement" and schedule a two-part workshop inviting public input on the causes and potential solutions to the water right permitting process itself. The first session should be aimed at identifying problems with the current process; the second should invite proposals and suggestions on ways to correct them. Once the water right process regains its efficacy, most of the enforcement issues will disappear.

ENFORCEMENT ISSUES

I agree with the Notice's statement that the goal of an enforcement policy is to be "predictable, consistent and fair." Beyond that, the purpose of the policy should be more to encourage compliance than simply to punish violations. To achieve this purpose, the policy must take into account both the reason for the asserted violation and its impacts on other water right holders and/or the environment. Enforcement actions should be reserved for those diverters who willfully disregard the water right permitting process and cause significant harm to senior water right holders and/or environmental resources. Cancellation and threatened cancellation of a pending water right application or permit should almost never be resorted to; such actions are contrary to the goal of encouraging compliance and with comprehensive management of the state's waters.

Any enforcement policy must also weigh the value of staff time devoted to enforcement activities against the value of that time if it were devoted to water right processing activities.

Finally, revenues from enforcement penalties should not be used as a replacement for funding that should rightfully come from the State General Fund or from water right fees. To utilize funds from enforcement actions creates the potential for compromising the fairness of the enforcement decision.

Enforcement action should not be levied indiscriminately.

1. Lack of a water right permit should not be the basis for enforcement.

As the Board's investigation of the Russian and Navarro River watersheds has shown, numerous water diversions and impoundments are not covered by a water right permit or license. It would be a mistake, however, to conclude that all of these impoundments are illegal, or to cite them as demonstrating the urgent need of enforcement action.

Unpermitted diversion or impoundment of water is not commensurate with illegal diversion. Sources of non-jurisdictional water include pre-1914 appropriation, groundwater and diffuse surface runoff ("sheetflow"). Increasingly, water users have turned to sheetflow as a source rather than become embroiled in the lengthy and expensive water right application process. In other instances, when Board staff has confronted property owners concerning their lack of a permit, many have opted to apply for a water right permit rather than face litigation over the non-jurisdictional nature of the water; however, such an application should not be viewed as an admission that there is no other legal basis for the use of the water.

Even if a permit is required, owners of existing reservoirs do not willfully violate the law, as a rule. Many have acquired property with pre-existing ponds – some installed years or decades ago by the Soil Conservation Service – and assumed that they were legal. Others have discovered belatedly that their impoundment exceeds the capacity authorized under their permits.

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Many of these ponds are for non-consumptive uses such as fire protection and wildlife enhancement. Upon learning of the lack of adequate authorization for their diversion, my experience is that these diverters submit an application and diligently pursue a permit. These applications often encounter intractable protests, even for static impoundments with no consumptive use or annual diversion.

No purpose would be served by initiating enforcement action against such persons or by requiring them to empty their reservoir; in fact, it could be counter-productive to encouraging compliance, and could adversely affect local natural resources.

2. Enforcement should not be undertaken if the "illegal diversion" is the result of changes in water right administration.

Water right administration has evolved over the decades with changes in law, Board policies and procedures, environmental awareness, and technology. These developments often result in reexamination of existing rights and discovery of oversights and inaccuracies in existing permits, requiring curative petitions or new applications. Water right holders who find themselves in such situations should not be threatened with penalties or required cessation of diversions.

For example, I know of at least two situations in which storage permits for municipal supply were granted by the Board and operated for decades before Board staff informed the public agency owner that an additional permit – for direct diversion – was required for use of water during the diversion season. The sole reason for the additional permit was the Board staff's belated consideration of the water right in light of LIFO (Last In – First Out)[1] accounting. Even though it was understood from the initial application that municipal water needs would occur year-round and be satisfied year-round, and even though there was always sufficient water in storage to supply the demand, Board staff concluded that LIFO principles mandated that a new direct diversion permit be obtained.

Complying with the Board staff's directive, water right applications were filed, protested, and have been in process for many years. Undertaking an enforcement action for illegal diversion, or requiring such "illegal direct diversion" to cease during the storage season in such circumstances would serve no purpose and would not be in the public interest.

3. Enforcement should not be undertaken if the "illegal diversion" is the result of a change in the status of the water source.

For virtually all of the 20th century, water extracted from wells was presumed to be percolating groundwater, which may be extracted and used without a permit from this Board. (*City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597, 628). In recent years, however, reliance

[1] / No law or regulation mandates the use of LIFO accounting; it may, in fact, constitute an underground regulation.

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on the *Pomeroy* presumption has become problematic. The Board's uncertain interpretation of "subterranean stream," together with increased understanding of the geology and hydrogeology of the state, has prompted the filing of protective water right applications by long-established pumpers with considerable investment in continued water use, despite lack of agreement concerning the characterization of the water in question.

Similarly, the distinction between use of spring water as surface water, contrasted with its extraction as groundwater, is not always clear. In instances in which the spring water user is informed by Board staff that a permit is required, no enforcement action should be undertaken, so long as the water user is diligently engaged in resolving the issue, or has filed a water right application.

Disputes have also arisen between water users and Board staff concerning whether water that is being collected is sheetflow or is, instead, streamflow. In all of these cases, applications may be filed even when the water user continues to dispute the characterization of the source as falling within the Board's jurisdiction.

Given the applicable legal presumption, and the ambiguity of source characterization, enforcement should not be undertaken against users of subsurface waters, spring water or claimed sheetflow, absent unusual circumstances, such as where there is clear evidence that the water is jurisdictional and diversion is demonstrably injurious to environmental resources, coupled with a refusal to engage in the permitting process. In the absence of any one of these three factors, enforcement action should be avoided; Board staff should concentrate instead on processing the subject application and bringing the water diversion within Board regulation.

4. Enforcement action should not be undertaken in the absence of evidence of specific harm.

Given the current long delays in the water right permitting process, many applications and petitions for change and/or extension of time remain unresolved. Some requested changes involve minor adjustments of the description of the right set forth in the permit. For these minor changes, no enforcement action should be undertaken. Instead, the Board staff should prioritize change petitions according to the possibility of impact on other water right holders or environmental resources and should concentrate their efforts on processing petitions as prioritized.

If not already accomplished, notices of the change petitions should be promptly issued, and protests used as one basis of prioritization. Environmentalists and water right holders have not been recalcitrant in filing protests, where adverse impact is threatened. Caution should be used in assessing claims of adverse impact, however, and discounted where only non-specific, watershed-wide allegations are stated.

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Blanket protests and general objections based on watershed-wide issues, rather than on potential harm from the individual application or petition, have stymied both applicants and the Board staff in processing applications and petitions. The resulting inability of staff and applicants to deal with these overly broad protests has had the effect of preventing any action on these filings, providing an incentive to protestants to continue to file such blanket encyclopedic protests and then seek enforcement for water right "violations."

Unless there is a clear basis for concluding that an unauthorized diversion or change is harming the environment or other water right holders, no enforcement action should be taken; if there is such evidence, the application or petition should be given priority for processing.

Penalties and fines should be calibrated to the degree and recurrence of harm.

Water Code section 1485 provides that penalties may accrue for each day that a water right violation occurs. Such on-going accretion of penalties can serve to spur corrective action or halt injurious diversions. However, where corrective action is already being undertaken, and no on-going harm is occurring, cumulative penalties serve little or no purpose. Applicants and petitioners trapped in a water right process they do not control, and the timing of which they do not control, should not be subject to cumulative penalties unless injury to water right holders or the environment is of a cumulative nature over time.

As one example, penalties for maintaining an unpermitted reservoir supporting non-consumptive uses should warrant penalties accumulating, at most, only during periods of active diversion from a stream. And, if the maintenance of the reservoir is not causing harm to the environment or to other water right holders, the Board should consider whether financial penalties should be imposed at all.

Similarly, if a water right holder has a pending petition to change a point of diversion, the Board should carefully weigh whether penalties would serve any purpose, even if the proposed new point of diversion is being utilized.

In other words, fairness requires that, where financial penalties are sought, the penalty calculation consider all of the underlying circumstances that created the water right violation, as described above, as well as the violator's remedial efforts, and must also take into account the existence and degree of harm caused by the violation.

Water right processing must be improved.

As stated at the outset, many or most of the enforcement issues will be resolved if this Board can address the problems besetting its water right processing. The joint letter submitted by Ellison, Schneider & Harris and others, to which I am a signatory, sets forth in some detail the problems and issues related to the Board's procedures and administration of the Division of Water Rights. I urge the Board to initiate a workshop to address the concerns set forth therein.

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Thank you for the opportunity to comment.

Sincerely,

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Janet K. Goldsmith

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cc: Victoria Whitney, Chief, Division of Water Rights

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